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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LONNIE LEE POSLOF, JR., Defendant and Appellant.	F079414 (Super. Ct. No. CRM028634) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ivan P. Mars, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This appeal concerns a postsentencing order for additional restitution in the amount of $1,440. On December 9, 2016, defendant Lonnie Lee Poslof, Jr. was convicted by jury of one count of engaging in oral copulation or sexual penetration with a child 10 years old or younger (Pen. Code, § 288.7, subd. (b); count 1),[1] two counts of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 2 & 3), and one count of engaging in oral copulation with a child under the age of 14 (former § 288a, subd. (c)(1); count 4).[2] On August 28, 2017, defendant was sentenced to a total determinate term of 12 years in prison on counts 2 through 4, plus a consecutive indeterminate term of 15 years to life on count 1. The trial court imposed a restitution fine of $10,000 under section 1202.4, subdivision (b)(1); a parole revocation restitution fine of $10,000 under section 1202.45, subdivision (a), stayed; a total court operations assessment of $160 under section 1465.8; and a total court facilities assessment of $120 under Government Code section 70373. Pursuant to section 1202.4, subdivision (f), the court ordered restitution in the amount of $12,243 to the California Victim Compensation Board (the Board) and retained jurisdiction over the issue.[3]

On April 12, 2019, the prosecutor filed a motion seeking additional victim restitution to the Board in the amount of $1,440. The trial court held a hearing on May 29, 2019, and granted the motion over defense counsel's objection that the court lacked jurisdiction. Defendant now seeks to have the court's order vacated on the ground that it is not supported by substantial evidence, in compliance with section 1202.4,

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Section 288a was renumbered to section 287, effective January 1, 2019. (Stats. 2018, ch. 423, § 49, pp. 88–91.) Former section 288a, subdivision (c)(1), is now section 287, subdivision (c)(1).

[3] Issues relating to defendant's conviction and sentence were raised in an earlier appeal, case No. F076258. In that appeal, defendant did not challenge the victim restitution order from his original sentencing hearing.

subdivision (f)(4)(B). He also claims that he is entitled to a new restitution hearing because he was not present for the hearing, he did not waive his appearance, and his absence was prejudicial.

The People contend that defendant forfeited substantive review of the trial court's order by failing to object on the ground now advanced on appeal. If we do not agree the claim is forfeited, however, they concede he is entitled to remand for a new restitution hearing. With respect to defendant's second claim, they concede he had a right to be present, but they maintain the error was harmless under the federal and state standards of review.

We conclude that defendant forfeited his evidentiary challenge to the restitution order by failing to object in the trial court and that his absence from the hearing was not prejudicial. Therefore, we affirm the trial court's order.

DISCUSSION

I. Claim Restitution Order Unsupported by Substantial Evidence

A. Background

Subject to exceptions not relevant here, section 1202.4, subdivision (f), provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court …." If the victim received assistance from the Board, restitution "shall be ordered to be deposited in the Restitution Fund" (*id.*, subd. (f)(2)), and "the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered[]" (*id.*, subd. (f)(4)(A)). "The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation Board reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental

expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation.…" (*Id.*, subd. (f)(4)(B).)

In this case, the probation report submitted prior to the sentencing hearing on August 28, 2017, recommended that defendant be ordered to pay victim restitution to the Board in the amount of $12,423, for mental health treatment for one adult and three minors. The court followed the recommendation and ordered restitution to the Board in that amount. More than one and one-half years later, the prosecutor moved for an order requiring defendant to pay restitution to the Board in the amount of $1,440 based on additional mental health treatment expenses paid on behalf of the victims. Defense counsel disputed the court's continued jurisdiction over the matter while defendant's appeal from his conviction and sentencing was pending review, but did not otherwise object. The court overruled the jurisdictional objection and granted the motion.

B. Claim Forfeited

The parties agree that the court's order for additional restitution in the amount of $1,440 is not supported by evidence, in contravention of section 1202.4, subdivision (f)(4)(B). However, they disagree whether defendant forfeited the claim by failing to object on the ground now advanced on appeal.

Defendant relies on *In re K.F.* for the proposition that "[s]ufficiency of the evidence has always been viewed as a question necessarily and inherently raised in every contested trial of any issue of fact, and requiring no further steps by the aggrieved party to be preserved for appeal." (*In re K.F.* (2009) 173 Cal.App.4th 655, 660 (*K.F.*).) Citing *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*), *People v. Anderson* (2010) 50 Cal.4th 19, and *People v. Nelson* (2011) 51 Cal.4th 198, the People disagree.

We conclude that defendant's argument is foreclosed by the California Supreme Court's decision in *Brasure*. In *Brasure*, the trial court ordered the defendant to pay the victim's mother a total of $102,500 in restitution, $100,000 for lost wages and $2,500 for expenses incurred in attending the trial. (*Brasure*, *supra*, 42 Cal.4th at p. 1074.) The

defendant claimed the award was unauthorized because "[the mother's] loss of income resulted from a psychological injury rather than a physical one[]" (*ibid.*), because there was evidence she "had sought a restraining order against her son and because [her] economic loss was not shown by documentation or sworn testimony[]" (*id.* at p. 1075).

The court rejected these arguments and held, "[B]y his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. [Citation.] As the order for restitution was within the sentencing court's statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it [citation], we do not decide whether the court abused its discretion in determining the amount." (*Brasure, supra,* 42 Cal.4th at p. 1075.)

Defendant urges us to follow *K.F.*, in which the Court of Appeal declined to find the defendant's evidentiary challenge to the trial court's restitution order forfeited, notwithstanding *Brasure*. (*K.F., supra,* 173 Cal.App.4th at p. 661.) The court observed that *Brasure* "was a capital murder case in which the court dealt with at least a dozen major contentions before reaching the [challenge to the restitution order]" (*id.* at p. 660), and concluded that "*Brasure* cannot be understood to have" "repudiat[ed] or abandon[ed] the rule … that no predicate objection is required to challenge the sufficiency of the evidence on appeal[]" (*id.* at p. 661; accord, *In re Travis J.* (2013) 222 Cal.App.4th 187, 203 [following *K.F.*]).

We are not persuaded to follow *K.F.* in this case. As an initial matter, although it should do so only in rare instances, "an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 887–888, fn. 7.) *K.F.* was concerned, in relevant part, with evidence indicating the trial court awarded restitution to the victim for costs the victim did not in fact incur: ambulance costs that were fully covered by insurance and state disability payments. (*K.F., supra,* 173 Cal.App.4th at pp. 664–666.) Thus, the decision

in *K.F.* was informed by considerations that, one, were affirmatively shown by evidence and, two, are not present here.

Furthermore, with respect to the *K.F.* court's aforementioned comment on *Brasure*, "[i]t is axiomatic that a case is not authority for an issue that was not considered[]" (*People v. Brooks* (2017) 3 Cal.5th 1, 110), and *Brasure* did not purport to establish a sweeping rule that requires, in all instances, an objection to preserve a sufficiency of the evidence challenge (*Brasure*, *supra*, 42 Cal.4th at p. 1075). Rather, in the context of a restitution order under section 1202.4, subdivision (f), and as distinct from a claim that the restitution order was unauthorized as a matter of law, the high court held that the "defendant forfeited any claim that the order was merely unwarranted by the evidence …." (*Brasure*, *supra*, at p. 1075; see *People v. Scott* (1994) 9 Cal.4th 331, 354 ["[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case."].) *Brasure* is controlling and "'[c]ourts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 197–198, quoting *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Moreover, subsequent to the decision in *K.F.*, the California Supreme Court held in *People v. McCullough* "that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*People v. McCullough* (2013) 56 Cal.4th 589, 597.) Critically, the court explained that a "[d]efendant may not 'transform … a factual claim into a legal one by asserting the record's deficiency as a legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' [the] defendant forfeits both his claim of factual error *and the dependent claim challenging* '*the adequacy of the record on that point*.'" (*Ibid.*, italics added.)

Finally, this case does not present an important legal issue warranting the exercise of discretion to excuse forfeiture and defendant does not argue otherwise. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 887–888, fn. 7 ["'[D]iscretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]'"].) Here, defendant's claim is that the restitution order is "merely unwarranted by the evidence[]" and accordingly, he forfeited the claim by failing to object in the trial court. (*Brasure*, *supra*, 42 Cal.4th at p. 1075.)

II. Defendant's Absence from Restitution Hearing

A. Error

"While 'the primary purpose of mandatory restitution … is reimbursement for the economic loss and disruption caused to a crime victim by the defendant's criminal conduct' [citation], 'the requirement that a convicted criminal defendant pay restitution for the losses caused by his crime has aims beyond strict compensation that include deterrence and rehabilitation [citation].'" (*People v. Petronella* (2013) 218 Cal.App.4th 945, 968, quoting *People v. Runyan* (2012) 54 Cal.4th 849, 865.) "Consequently, '[r]estitution hearings held pursuant to [Penal Code] section 1202.4 are sentencing hearings and are thus hearings which are a significant part of a criminal prosecution.'" (*People v. Petronella*, *supra*, at p. 968, quoting *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.)

The parties agree that defendant had a right under the federal and state constitutions to be present at the hearing (*People v. Mendoza* (2016) 62 Cal.4th 856, 898; *People v. Wilen* (2008) 165 Cal.App.4th 270, 286–287; § 977, subd. (b)(1)), and there is no evidence in the record that he waived his appearance (*People v. Mendoza*, *supra*, at pp. 898–899; § 977, subd. (b)(2)). We accept these concessions and turn to the parties' point of contention: whether the error was prejudicial.

B. Prejudice

Errors of federal constitutional magnitude are reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, which requires us to determine whether the error complained of was "harmless beyond a reasonable doubt." (*People v. Lara* (2019) 6 Cal.5th 1128, 1138, citing *Chapman, supra,* at p. 24.) "The burden is on the beneficiary of the error 'either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.'" (*People v. Stritzinger* (1983) 34 Cal.3d 505, 520, quoting *Chapman, supra,* at p. 24.)

At the original sentencing hearing, the victim's mother spoke of "countless hours [spent] in therapy trying to recover from the damage that [defendant] did to [their] family," and as previously discussed, the restitution order for $12,243 to the Board was for mental health counseling expenses incurred by one adult and three minor victims.[4] At the subsequent restitution hearing at issue in this appeal, the court ordered an additional $1,440 in restitution to the Board to reimburse payments to the victim from the Restitution Fund for mental health treatment expenses.

There is no dispute that mental health counseling expenses qualify for restitution (§ 1202.4, subd. (f)(3)(C)), and defendant's interests were represented by counsel at the hearing. The People point out that "the amount of assistance provided [through the Restitution Fund] shall be presumed to be a direct result of the defendant's criminal conduct" (§ 1202.4, subd. (f)(4)(A)), and defendant's attorney did not contest the amount. We further note that defendant did not contest the $12,243 restitution order from the original sentencing hearing, which was also based on mental health counseling services and for which he was present. Under these circumstances, we agree with the People that nothing in the record suggests that defendant's absence from the hearing resulted in any

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[4] The crime victim's mother and siblings are also victims within the meaning of section 1202.4. (§ 1202.4, subd. (k).)

injury to him. (See *In re Guiomar* (2016) 5 Cal.App.5th 265, 279 [violation of the defendant's right to be present at Prop. 47 resentencing hearing harmless beyond a reasonable doubt in absence of showing his presence would have made a difference]; but see *People v. Cutting* (2019) 42 Cal.App.5th 344, 350 [the defendant's absence from resentencing hearing not harmless where appellate court had stricken nine-year enhancement and trial court had jurisdiction on remand to modify every aspect of sentence].)

Defendant argues that had he been present, he could have both insisted counsel require substantiation of the expenses and advised counsel of any evidence to rebut the claim. As discussed, there is no documentation in the record regarding the $1,440 in mental health counseling expenses and, therefore, the court erred by failing to fulfill this procedural aspect of the statute. However, the amount sought was payable to the Board as reimbursement for expenses paid from the Restitution Fund and the court previously ordered restitution to the Board for mental health counseling expenses without objection. Nothing in the record suggests that defendant's absence harmed him in that there existed grounds to challenge the amount or fact of the restitution sought. (See *In re Travis J.*, *supra*, 222 Cal.App.4th at pp. 203–204 [reversing $850 direct restitution order where victim claimed loss of $2,900 to probation officer, but trial court found victim lacked credibility and awarded her $850 based on its own unsupported estimate of damages]; *K.F.*, *supra*, 173 Cal.App.4th at pp. 664–666 [trial court awarded expenses for losses not incurred by the victim].) Notably, trial counsel did not raise any substantive challenges to the restitution sought and counsel is presumed competent. (*Strickland v. Washington* (1984) 466 U.S. 668, 690 ["[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."].) Defendant's assertion that he may have been able to rebut the showing is purely speculative, as he cites nothing in the record for support and he advances no

argument that he possessed information bringing into question the expenses paid from the Restitution Fund on behalf of the victims.

We have considered the parties' arguments and, under the circumstances here, we conclude the People have met their burden of showing that defendant's absence at the restitution hearing was harmless beyond a reasonable doubt. We affirm the trial court's order.[5]

DISPOSITION

The restitution order is affirmed.

MEEHAN, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

SNAUFFER, J.

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[5] Our decision in this matter should not be viewed as endorsing either the failure to comply with the procedural requirements of section 1202.4, subdivision (f)(4)(B), or the failure to ensure defendant's presence at the hearing absent a valid waiver. However, on the facts of this case, the error was simply not prejudicial.